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No. 90-1779

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

TELESAVER, INC. and
VISTA TECHNOLOGIES, INC.,

*Petitioners,*

vs.

UNITED STATES TRANSMISSION SYSTEMS, INC.,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In the absence of any claim by Petitioners that the decisions below conflict with prior decisions of this Court or of another Court of Appeals, do the lower courts' unpublished opinions, holding that a corporation which has waived a jury trial cannot revive that right by joining its corporate parent as a plaintiff, present an issue of sufficient importance to warrant consideration by the Court?

## STATEMENT PURSUANT TO SUPREME COUKT RULE 29.1

At the time this litigation was commenced, Respondent United States Transmission Systems, Inc. was wholly owned, through intervening subsidiaries, by ITT Corporation, a publicly held company. In December 1988, Respondent's name was changed to ITT Communications Services, Inc., and in August 1989, Respondent was sold to Metromedia Long Distance, Inc. Pursuant to the terms of the sales agreements, ITT remains responsible for any judgment or costs resulting from this litigation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

Petitioner Telesaver, Inc. ("Telesaver") was originally the only plaintiff in this action, which was commenced by the filing of its Complaint on July 27, 1986. Telesaver did not include a jury demand in that Complaint or in the Reply which it served on October 22, 1986 in response to the Counterclaims of Respondent United States Transmission Systems, Inc. ("USTS" or "Respondent"). Nor did Telesaver demand a jury trial within ten days after serving its Reply. It is not disputed that Telesaver thereby waived its right to a jury. *See* Fed. R. Civ. P. 38(b), (d).

Then came the amended pleadings. First, on October 10, 1986, Telesaver obtained leave to amend its Complaint to add Petitioner Vista Technologies, Inc. ("Vista"), Telesaver's ostensible parent company, as a party plaintiff. That Amended Complaint contained no jury demand. Then, on January 5, 1987, USTS amended its Counterclaims to include Vista.[1] Next, on February 2, 1987, Telesaver (but not Vista) replied to the Amended Counterclaims and again did not request a jury. Finally, on April 3, 1987, about five months after Telesaver's time to demand a jury had expired, Vista replied to USTS's Amended Counterclaims and, at the back of that Reply, demanded a jury trial.

Petitioners never explained why they delayed serving a jury demand until almost nine months after serving their Complaint. Although their Petition for Writ of Certiorari ("Petition") appears to suggest that their delay was somehow related to Vista's receiving permission to sue from a United States Bankruptcy Court (*see* Petition, p. 3), in fact, Vista had received such permission before Telesaver's original Complaint was ever served or filed.

USTS moved to strike Vista's jury demand as untimely, arguing that Vista had been bound by Telesaver's prior waiver. The United States District Court for the District of Maryland granted USTS's motion in an unpublished letter order. App. 41a. At no time did Petitioners ask the District Court to exercise its discretion under Fed. R. Civ. P. 39(b) to grant them a jury trial notwithstanding their failure to make a timely demand.

Following a ten-day non-jury trial, the District Court, in an extensive opinion, granted judgment in favor of USTS on its Amended Counterclaims and against Petitioners on the claims in their Amended Complaint. App. 3a. The United States Court of Appeals for the Fourth Circuit, in an unreported opinion, affirmed both the order striking the jury demand and the District Court's judgment in its entirety. App. 1a.

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[1] It should be noted that the Amended Complaint and Amended Counterclaims that added Vista as a party did not raise any new factual issues that could have revived Telesaver's right to a jury trial.

## ARGUMENT

### THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

### I. NO SPECIAL REASONS EXIST FOR A GRANT OF THE PETITION

A petition for a writ of certiorari from a decision of a United States Court of Appeals will be granted only when there are special and important reasons for granting the writ, such as when conflicts exist between the Court of Appeals' decision and the decisions of this Court, or other Courts of Appeals, or state courts of last resort. Special and important reasons may also exist when an important question of federal law has not been, but should be, settled by this Court, or when the Court of Appeals has so far departed from the accepted course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's jurisdiction. U.S. Sup. Ct. Rule 10.1.

No such special or important reasons exist here. Petitioners have not even argued that they do. Petitioners have cited no authorities from this Court, other Courts of Appeals, or state courts of last resort that conflict with the determination below that a corporation which has waived its right to a jury trial cannot revive that right by joining its corporate parent and having that parent demand a jury trial.[2]

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[2] Petitioners cite four District Court decisions in which newly added parties were allowed to make jury demands after the original litigants' time to seek a jury had expired. All of these cases are distinguished at footnote 5, *infra*, on the grounds that the new litigants in these cases were independent of the original parties, and were not corporate affiliates. It should also be noted, however, that only one of these District Court decisions was reviewed by a Court of Appeals, and in that case the appellate court affirmed on the alternative ground that granting a jury was an appropriate exercise of the District Court's discretion under Rule 39(b), without reaching the issue of whether a timely demand had been made under Rule 38. *Swofford v. B&W, Inc.*, 336 F.2d 406, 408 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

In considering whether, in the absence of any conflict with other appellate courts, this case presents an important issue worthy of this Court's consideration, it should first be emphasized that neither the District Court nor the Fourth Circuit saw fit to publish its decision denying Petitioners' jury demand. Because the lower courts disposed of this case in unreported opinions of no precedential value, no future litigant will be affected in any way by the lower courts' rulings.

Moreover, the issue presented here is not an important federal question that needs to be settled by this Court. Ever since the Federal Rules of Civil Procedure were adopted in 1937, Rule 38 has provided that a litigant's right to a jury trial is waived unless a timely demand is made pursuant to that Rule. Despite a half century of practice under Rule 38, Petitioners are unable to cite a single case prior to this one in which a federal court was called upon to decide whether a subsidiary's waiver of a jury demand was binding on its parent. This issue has not arisen in the past, and is unlikely to recur in the future, for the obvious reason that if both a corporate parent and its subsidiary are truly necessary plaintiffs in a lawsuit, both will ordinarily be made parties at the outset of the litigation, and both will demand (or decide not to demand) a jury at the time they file their original complaint.

Petitioners suggest that they have grave constitutional concerns regarding their right to a jury trial (*see* Petition, pp. 5-7), but their argument is specious. This case raises no issue concerning Petitioners' substantive right to a jury; it merely involves the well-established procedural rules governing the way in which that right must be invoked. Petitioners had ample opportunity to exercise their constitutional right to a jury trial but, whether by design or inadvertence, they waived that right. Having waived their right to a jury, Petitioners tried to revive it by joining Vista, whose claims precisely duplicated those of Telesaver, as a party plaintiff. The lower courts' refusal to countenance Petitioners' ruse did not show constitutional infirmity, but rather was a sensible resolution of the issue raised by Petitioners. As will be demonstrated below, the lower courts' disposition of this issue was also clearly correct.

## II. THE LOWER COURTS CORRECTLY HELD THAT VISTA WAS BOUND BY THE PRIOR WAIVER OF ITS WHOLLY-OWNED SUBSIDIARY, TELESAVER

Petitioners' argument in this Court is that because Telesaver and Vista were separate corporations, Telesaver's waiver of a jury trial cannot be binding on its corporate parent. Even assuming *arguendo* that this argument were of sufficient importance to merit consideration by the Court, it is not clearly presented by this case. The record demonstrates that Telesaver and Vista did not maintain the formalities of separate corporate existence, and they therefore should not now be heard to argue that they were two distinct entities for purposes of this litigation.

At trial, Petitioners' counsel asked Richard Goldman, the president of both Petitioners, the following:

> Q. I wonder if you could describe for us the precise corporate relationship between the two companies, Telesaver and Vista?

Mr. Goldman responded:

> A. There is no corporate relationship. *Telesaver and Vista were one and the same....*
>
> (emphasis added).

This trial testimony concerning the identity of Telesaver and Vista is consistent with the evidence developed in discovery that was before the trial court when it struck the jury demand. Petitioners' counsel advised the District Court in a memorandum concerning a discovery dispute that Telesaver was "never separately capitalized and...continued to operate as [a] division of [Vista] with one set of books." In addition, Mr. Goldman admitted at his deposition that Telesaver and Vista "did not operate as separate corporations." In discovery, Petitioners also produced a letter authored by Mr. Goldman which stated that "Telesaver and Vista Technologies are inextricably woven together, historically and legally, in the eyes of both creditors and investors."

Under Maryland corporate law, Petitioners' failure to maintain the formalities of separate corporate existence is clearly a sufficient ground for holding that the corporate parent, Vista, is bound by the actions of Telesaver. Brune, *Maryland Corporation Law and Practice*, § 371 at p. 435. Because the lower courts' denial of Petitioners' jury demand can be sustained on this state-law ground, which raises none of the purported constitutional issues that Petitioners seek to present to this Court, this case does not present an appropriate vehicle for this Court to examine those issues.

Furthermore, even if Telesaver and Vista had observed the formalities of separate corporate existence, there is no support for the rule of law that Petitioners ask this Court to adopt. Citing *Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295, 340 A.2d 225 (1975), Petitioners argue that Telesaver's waiver of a jury trial can be binding on Vista only if circumstances exist that would justify the courts in "piercing the corporate veil" of limited liability and imposing Telesaver's financial obligations on its stockholder and parent, Vista. Under Petitioners' view, the undisputed facts (a) that Telesaver was a wholly-owned subsidiary of Vista; (b) that Vista and Telesaver were commonly controlled and managed by the same president; (c) that both companies were represented by the same counsel throughout the litigation and (d) that they asserted duplicative claims against USTS, based on contracts to which they were both parties, are all irrelevant unless it can be shown that Petitioners were engaged in fraud or other unlawful conduct of the sort that would justify holding Vista liable for Telesaver's misconduct.

Petitioners cite no authority for their remarkable proposition that the strict test which is a prerequisite to "piercing the corporate veil" for substantive purposes must also be applied to determine the federal procedural question of whether Telesaver's jury waiver is binding on Vista. The *Bart Arconti* case and the other Maryland cases on which Petitioners rely all dealt with respecting the corporate form for purposes of determining substantive rights and liabilities, and none of Petitioners' cases addresses the issue of whether a corporate subsidiary can bind

the parent by its choice of procedural tactics during litigation. Accordingly, the Petition completely fails to establish that Maryland would apply the same rules for these procedural purposes as it and other states have traditionally applied to protect the essential corporate attribute of limited liability.

Furthermore, regardless of what Maryland law may provide, the question of whether Petitioners have a right to a jury trial is a matter of federal law, even in this diversity case. *Simler v. Conner*, 372 U.S. 221, 222 (1963). The rule of law which Petitioners would have this Court adopt is contrary to an accepted body of federal case law that holds, in analogous circumstances, that the identity of interests between a parent corporation and its subsidiary is sufficient to allow one company to be bound by the other's litigation judgments, even though the two corporate entities are formally distinct. As indicated above, the issue of whether a subsidiary corporation can waive its parent's right to a jury trial is so unlikely to arise in litigation that Respondent is aware of no case that addresses this specific issue (although case law generally supports the proposition that when a new plaintiff is closely related to the original plaintiff, the first plaintiff's jury waiver is binding on the second).[3] However, the Court

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[3] For example, in *Ryan v. Loui* (*In Re Corey*), 892 F.2d 829, 836-37 (9th Cir. 1989), *cert. denied*, __U.S.__, 111 S. Ct. 56 (1990), the Ninth Circuit held that a party otherwise entitled to a jury trial was properly denied that right because it was a controlled instrumentality of a party that had already waived a jury trial. The Court further noted that the two related entities there, like Vista and Telesaver here, had identical litigation interests and were represented by the same attorneys. *Id.* at 837 n.4.

Likewise, in *Pennsylvania ex rel. Feiling v. Sincavage*, 439 F.2d 1133, 1134 (3d Cir. 1971), plaintiff, who had failed to make a timely jury demand, moved to amend the complaint to add his wife as a party plaintiff. The trial court granted this motion, but, when the wife was joined and demanded a jury trial, the trial court struck the demand. The Third Circuit affirmed.

Similarly, in *Ed Brawley, Inc. v. Gaffney*, 399 F. Supp. 115, 118 (N.D. Cal. 1975), a plaintiff in a copyright infringement action waived a jury trial by

*(Footnote continued)*

may properly look by analogy to the doctrines of *res judicata* and collateral estoppel, where it is well established that a corporation or its controlling stockholder may be bound by a judgment against a corporate affiliate, even though grounds do not exist for piercing the corporate veil between the two entities. *See, e.g., Anaconda-Ericsson, Inc. v. Hesson* (*In re Teltronics Servs., Inc.*), 762 F.2d 185, 190-91 (2d Cir. 1985); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869-70 (5th Cir. 1984); *United States v. Gottheiner* (*In re Gottheiner*), 703 F.2d 1136, 1139-40 (9th Cir. 1983); *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968).*

Under these cases, a court need not pierce the corporate veil for a parent company to be bound by a judgment against its subsidiary. Rather, it must only be shown that there is an identity of interest in the litigated issue and that the parent has the ability to control the subsidiary's affairs. Under this standard, Vista would certainly have been bound by the judgment against Telesaver had Vista not been added as a party because, as a co-party to the contract, its interests were identical to Telesaver's and both companies were under common control and managed as a single entity. Because Telesaver could bind Vista as to the outcome of the *entire* litigation, it should *a fortiori* follow that

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failing to serve a jury demand within the time required by Rule 38. Plaintiff then tried to revive that right by amending the complaint to add a new plaintiff, a party whose rights were derived from the same copyright. The new plaintiff then served a jury demand. Once again, the court permitted the amendment to the complaint, but struck the jury demand. 399 F. Supp. at 118; *see also General Battery Corp. v. Globe-Union, Inc.*, 100 F.R.D. 258, 264 (D. Del. 1982).

* It should be noted that the Maryland courts, like the federal judiciary, have relaxed the traditional requirements of the *res judicata* and collateral estoppel doctrines, and hold that persons who are not formally parties to a litigation may nonetheless be bound by a judgment if their interests are effectively represented by one of the litigants. *See First Nat'l Bank of Md. v. Department of Health*, 284 Md. 720, 399 A.2d 891, 899 (1979). Accordingly, the *res judicata* and collateral estoppel cases cited above would support the lower courts' rulings by analogy even if the issue raised by Petitioners were determined pursuant to Maryland law.

Telesaver had the power to bind Vista to any one of the many tactical decisions Telesaver made in the course of the lawsuit, in this case the decision to waive a jury trial.

For the foregoing reasons, the lower courts were correct in striking Vista's jury demand as untimely.[5]

There is absolutely no merit to Petitioners' alternative suggestion that the lower courts somehow abused their discretion by denying Petitioners a jury trial notwithstanding the untimeliness of their jury demand. At the time when Vista's jury demand was stricken, the case law in the Fourth Circuit clearly provided that a pleading in opposition to a motion to strike a jury demand under Fed. R. Civ. Proc. 38(d) would *not* be considered a request in the alternative for the discretionary grant of a jury under Fed. R. Civ. Proc. 39(b). *Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 939 (4th Cir. 1980). In *Malbon*, the Fourth Circuit expressly warned litigants that they must make the appropriate motion under Rule 39(b) if they wished to preserve for appeal any issue relating to the trial court's exercise of discretion. *Id.* Notwithstanding *Malbon*, Petitioners never made any motion under Rule 39(b) asking the District Court to exercise its discretion to grant them a jury trial. Petitioners' failure to exhaust their potential remedies in the trial court gave the Fourth Circuit an appropriate ground for summarily rejecting their appeal on this point, and Petitioners do

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[5] The authorities Petitioners cite in support of their argument, *Butterfield v. Crist*, 52 F.R.D. 489, 490 (E.D. Wis. 1971); *Swofford v. B&W, Inc.*, 34 F.R.D. 15 (S.D. Tex. 1963), *aff'd*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *Rupe v. Fourman*, 532 F. Supp. 344, 351 (S.D. Ohio 1981); and *Mortenson v. Pacific Far East Line, Inc.*, 148 F. Supp. 71, 72 (N.D. Cal. 1956), are not inconsistent with this result. In these cases, new parties were joined in an action after the original parties had already waived their rights to a jury trial, and the newly joined parties demanded and obtained jury trials. In all of these cases, however, the newly-joined parties were independent parties who had never had a chance to request a jury trial previously. Unlike the facts here, the newly-joined parties were not alter egos, affiliates, or divisions of parties already joined. *Butterfield*, 52 F.R.D. at 489-90; *Swofford*, 34 F.R.D. at 16-17; *Rupe*, 532 F. Supp. at 351; *Mortenson*, 148 F. Supp. at 72.

not even suggest that this Court should review and reverse the procedural rule enunciated by the Fourth Circuit in *Malbon*. Further, Petitioners' failure to seek discretionary relief from the District Court demonstrates that Petitioners' interest in a jury trial was not as important to Petitioners as they now seek to portray it in this Court.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
June 20, 1991

Respectfully submitted,

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